

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

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9	UNITED STATES OF AMERICA,	)	No. CR-F-02-5333 REC
10		)	
11	Plaintiff,	)	RULING FOLLOWING NINTH
12	vs.	)	CIRCUIT REMAND PURSUANT TO
13		)	<u>UNITED STATES V. AMELINE</u>
14	JUAN ANTONIO CHAVEZ-REGALADO,	)	THAT COURT WOULD NOT HAVE
15	Defendant.	)	IMPOSED A MATERIALLY
16		)	DIFFERENT SENTENCE
17		)	

Juan Antonio Chavez-Regalado was charged with being a  
deported alien found in the United States in violation of 8  
U.S.C. § 1326. After unsuccessfully moving to dismiss the  
Indictment, defendant pleaded guilty pursuant to a written plea  
agreement. The Presentence Report (PSR) recommended a sentence  
of 57 months. The United States had a fast track policy where  
twice deported defendants, without regard to their criminal  
history, could plead to a misdemeanor count carrying a six month  
sentence and one felony count for a second entry, carrying a  
maximum 24 month sentence, for a total of 30 months. However,

1 because defendant had only illegally entered the United States  
2 once, he could not take advantage of this policy. The court  
3 downwardly departed because of this anomaly, reducing the  
4 sentence to 30 months. The court also denied defendant's request  
5 for a further departure based on his cultural assimilation based  
6 on the facts that defendant had resided in the United States  
7 since the age of 12, attended U.S. schools, and had a wife and  
8 children who are American citizens. The court impliedly adopted  
9 the recommendation in the PSR against a downward departure for  
10 cultural assimilation because of defendant's record of criminal  
11 convictions, two of which (for narcotics distribution) were  
12 sustained after defendant illegally returned to the United States  
13 following his deportation. The court declined defendant's  
14 request that his federal sentence run concurrent with the state  
15 sentence defendant was serving. Defendant was sentenced on  
16 September 22, 2003 to 30 months imprisonment and 36 months of  
17 supervised release. Defendant appealed to the Ninth Circuit.  
18 The Ninth Circuit affirmed defendant's conviction, but further  
19 held:

20       The district court sentenced the defendant  
21 properly under the mandatory United States  
22 Sentencing Guidelines in 2003. He argued in  
23 his petition for rehearing that he must be  
24 resentenced because the district court  
25 enhanced his sentence based on facts found by  
26 a judge, not a jury, in violation of Blakely  
v. Washington ... He also requested relief  
under the discretionary sentencing guidelines  
pursuant to the Supreme Court's resolution of  
United States v. Booker ... We deferred  
decision on his petition for rehearing until  
this Circuit's decision in United States v.

1        Ameline ... Consistent with this Circuit's  
2        approach post-Booker, we agree that the  
3        district court should determine whether 'the  
4        sentence imposed would have differed  
5        materially if the district court judge were  
6        applying the Guidelines as advisory rather  
7        than mandatory ....' ....

8        In United States v. Ameline, 409 F.3d 1073 (9<sup>th</sup> Cir. 2005),  
9        the Ninth Circuit addressed how to apply United States v. Booker,  
10        \_\_ U.S. \_\_\_, 125 S.Ct. 738 (2005), when the Booker error was not  
11        preserved for appeal.

12        In Booker, the Supreme Court struck down the Sentencing  
13        Guidelines to the extent that the Sentencing Reform Act mandated  
14        the imposition of sentences predicated on facts not found by the  
15        jury or admitted by the defendant, an outcome following from the  
16        conclusion that the Sixth Amendment precludes a judge from  
17        enhancing a sentence based on extra-verdict findings (other than  
18        the fact of prior conviction) in a mandatory sentencing regime.  
19        125 S.Ct. At 748-749. The Supreme Court remedied the Sixth  
20        Amendment infirmity in the Sentencing Guidelines by making the  
21        Guidelines effectively advisory. The remedial portion of Booker  
22        agreed that "without this provision - namely the provision that  
23        makes 'the relevant sentencing rules mandatory and imposes  
24        binding requirements on all sentencing judges' - the statute  
25        falls outside the scope' of the Sixth Amendment's jury trial  
26        requirement. 125 S.Ct. At 764. Rather than engraft a jury trial  
27        requirement onto the mandatory sentencing guideline system,  
28        Booker severed from the Sentencing Reform Act of 1984 "the  
29        provision that requires sentencing courts to impose a sentence

1 within the applicable Guidelines range (in the absence of  
2 circumstances that justify a departure) and the provision that  
3 sets forth standards of review on appeal, including de novo  
4 review of departures from the applicable Guidelines range.' Id.  
5 Although the Sentencing Guidelines are now advisory,

6 the Act nonetheless requires judges to take  
7 account of the Guidelines together with other  
8 sentencing goals. See 18 U.S.C. § 3553(a)  
9 (Supp. 2004). The Act nonetheless requires  
10 judges to consider the Guidelines 'sentencing  
11 range established for ... the applicable  
12 category of defendant,' § 3553(a)(4), the  
13 pertinent Sentencing Commission policy  
14 statements, the need to avoid unwarranted  
15 sentencing disparities, and the need to  
16 provide restitution to victims, §§  
3553(a)(1), (3), (5)-(7) (main ed. and  
Supp.2004). And the Act nonetheless requires  
judges to impose sentences that reflect the  
seriousness of the offenses, promote respect  
for the law, provide just punishment, afford  
adequate deterrence, protect the public, and  
effectively provide the defendant with needed  
educational or vocational training and  
medical care. § 3553(a)(2) (main ed. and  
Supp.2004) ....

17 Booker, 125 S.Ct. at 764-765.

18 The Ninth Circuit in Ameline noted that it is "crucial" to  
19 appreciate the distinction drawn by the Supreme Court:

20 Standing alone, judicial consideration of  
21 facts and circumstances beyond those found by  
22 a jury or admitted by the defendant does not  
23 violate the Sixth Amendment right to jury  
trial. A constitutional infirmity arises  
only when extra-verdict findings are made in  
a mandatory guidelines system.

24 Ameline, 409 F.3d at 1077-1078. Ameline addressed the procedure  
25 to be followed by the Ninth Circuit and, ultimately, the district  
26 court, when faced with an unpreserved Booker error:

1 If an eligible party seeks resentencing under  
2 Booker/Fanfan, we will then engage in the  
3 plain error analysis described in this  
4 opinion. If that analysis leads the panel to  
5 the same dead end that we reach here, where  
6 it is not possible to reliably determine from  
7 the record whether the sentence imposed would  
8 have been materially different had the  
9 district court known that the Guidelines were  
10 advisory, we will remand to the sentencing  
11 court to answer that question.

12 In answering the question we pose, the  
13 district court need not determine or express  
14 what the sentence would have been in an  
15 advisory system. It is enough that the  
16 sentence would have been materially  
17 different. We agree with the Second Circuit  
18 that the 'views of counsel, at least in  
19 writing,' should be obtained. ....

20 If the district court determines that the  
21 sentence imposed would not have differed  
22 materially had he been aware that the  
23 Guidelines were advisory, the district court  
24 judge should place on the record a decision  
25 not to resentence, with an appropriate  
26 explanation. A party wishing to appeal the  
order may file a notice of appeal as provided  
in Fed.R.App. P 4(b).

27 If the district court determines that the  
28 sentence imposed would have differed  
29 materially if the district court judge were  
30 applying the Guidelines as advisory rather  
31 than mandatory, the error was prejudicial,  
32 and the failure to notice the error would  
33 seriously affect the integrity, fairness and  
34 public reputation of the proceedings. In  
35 such a case, the original sentence will be  
36 vacated and the district court will  
37 resentence with the defendant present. In  
38 resentencing the defendant, the district  
39 court is permitted to take a fresh look at  
40 the relevant facts and the Guidelines  
41 consistent with Booker, the Sentencing Reform  
42 Act of 1984, Rule 32 of the Federal Rules of  
43 Criminal Procedure, and this opinion ... In  
44 either case, the defendant and the government  
45 have the right to appeal to this court the  
46 district court's decision, including a

1 challenge to the sentence based on the  
2 reasonableness standard established in  
3 Booker. ....

409 F.3d at 1084-1085.

4 Counsel for the parties appeared on October 31 for a status  
5 conference regarding this remand. The court ordered the parties  
6 to file briefs pursuant to Ameline and to appear for argument on  
7 November 21.<sup>1</sup>

8 Based on the record in this action, including the PSR,  
9 defendant's objections to the PSR, the Probation Office's reply  
10 thereto, the transcript of sentencing, the parties' briefs  
11 concerning the Ameline remand, oral argument on November 21, the  
12 Sentencing Guidelines, and the factors set forth in 18 U.S.C. §  
13 3553(a), the court concludes that defendant's sentence would not  
14 have been materially different had the court known at the time of  
15 defendant's sentencing that the Sentencing Guidelines were

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16  
17 <sup>1</sup>Defendant was not personally present at the hearing on  
18 October 31. Although the United States argued that defendant's  
19 presence was not necessary because the initial aspect of the remand  
20 involved resolution of a question of law, see discussion infra, the  
21 court ordered defendant to appear. A writ was issued for  
22 defendant's appearance. However, the United States repeats its  
23 contention that defendant's presence is not required for the court  
24 to determine whether, under Ameline, the court would have imposed  
25 a materially different sentence had the court been aware that the  
26 Sentencing Guidelines were advisory. The court agrees with the  
United States. Rule 43(b)(3), Federal Rules of Criminal Procedure,  
provides that a defendant's presence is not required if "[t]he  
proceeding involves only a conference or hearing on a question of  
law." Decisions hold that a defendant's presence is not required  
for the initial determination whether the sentence would have been  
materially different. See United States v. Crosby, 397 F.3d 103,  
120 (2<sup>nd</sup> Cir. 2005); United States v. Paladino, 401 F.3d 471, 484  
(7<sup>th</sup> Cir. 2005); United States v. Coles, 403 F.3d 764, 770 (D.C.Cir.  
2005).

1 advisory. At the time sentence was imposed, the court did not  
2 impose the sentence recommended under the Sentencing Guidelines.  
3 Rather, the court substantially reduced the term of imprisonment  
4 because an anomaly in the "fast track" sentencing policy of the  
5 United States resulted in an unfair application of the Sentencing  
6 Guidelines. However, the court would not have considered any  
7 further reduction in defendant's sentence because of his cultural  
8 assimilation, family ties or anticipated deportation because of  
9 defendant's criminal background, which included the commission of  
10 two narcotics felonies after petitioner illegally returned to the  
11 United States. The court also would not have considered making  
12 defendant's sentence in this federal criminal action concurrent  
13 to the sentences imposed by the state court. The court  
14 substantially reduced defendant's sentence because of the "fast  
15 track" anomaly discussed above. Making defendant's federal  
16 sentence concurrent with the state sentences would have given  
17 defendant would have resulted in essentially no punishment for  
18 defendant's illegal re-entry into the United States.

19 ACCORDINGLY:

20 1. For the reasons set forth herein, the court concludes  
21 that it would not have imposed a materially different sentence if  
22 the court had known at the time sentence was imposed that the  
23 Sentencing Guidelines are advisory.

24 IT IS SO ORDERED.

25 **Dated: November 21, 2005**  
26 668554

**/s/ Robert E. Coyle**  
UNITED STATES DISTRICT JUDGE